The Paradox of the Disappearing Book
How to ensure rules on Out of Commerce Works really work

Copyright lasts a long time – a lifetime in fact, plus another seventy years. But most published works will stop being commercially available after only a few years – long before they enter the public domain. Even more works have never been available commercially. Collectively, these are described as out of commerce works.

When this happens, the work – and its author – risk 'disappearing'. Libraries and other cultural heritage institutions often hold copies. But economic rights under copyright mean that they can only give access to the public on the premises, or in some cases through lending. Paradoxically, these economic rights limit authors' chances of being rediscovered, and of earning further revenues from their work.

The European Commission recognised the challenge in its proposals on Out of Commerce Works. It proposed that that collective management organisations (CMOs) should be allowed to offer licences for out-of-commerce works – and collect fees from libraries and cultural heritage institutions – on behalf of authors and creators that they do not represent.

After making information about these works available on a European platform for a time – in order to give creators the opportunity to object – the CMO can also offer licences for use across Europe. To do this, CMOs must be sufficiently representative of rightholders within a particular sector.

However what if a CMO doesn't exist in a given sector[1]? What if it is not sufficiently representative? What if it doesn't want to offer a licence? For libraries and cultural heritage institutions, the current formula – a long over-due European response to Google Books – will **not** achieve its policy aims. The current Presidency Compromise does not change this.

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[1] According to soon-to-be-published research, only one EU Member State – Denmark – has CMOs that serve all types of rightholder. Around half may not have CMOs that cover every type of work.

We can only break out the paradox if we introduce an exception to copyright for the use of out-of-commerce works, when neither individual – or collective – licensing works.[2]

Here's who benefits:

Creators will have new opportunities for rediscovery, and recommercialisation of their works. Authors in smaller countries, where relevant CMOs may not exist, should particularly benefit from this. At any point, any author can ask for their works to be excluded from such schemes.

Collective Management Organisations will, with the exception in place, see a stronger incentive than ever to establish themselves or offer a licence. Those that already exist will benefit from greater legal certainty, given that their activities are based on the exception.

Libraries and Cultural Heritage Institutions will have a sure means, via the exception or through a CMO, to give broader access to the works they hold, and so move closer to fulfilling their mission.

European citizens will enjoy a much wider access to their own culture, in all of its diversity. With the European Year of Cultural Heritage in 2018, it is a perfect time to ensure that Europe can do justice to its creators and creativity. European policy makers will have achieved their goal of facilitating mass digitisation of out of commerce works in Europe.
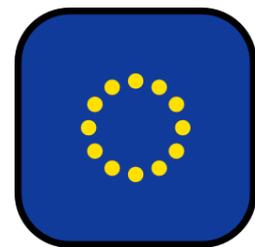
To maximise access for Europeans – and opportunity for European creators – Europe needs an exception for use of Out of Commerce Works.

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[2] The exception for educational establishments to make recordings of broadcasts in UK law is a model example of a hybrid licence and exception. The existence of the exception, which can only be enjoyed if there is no licence available, means that educational establishments and students are guaranteed access to broadcast material. This formula not only incentivises CMOs to be established and offer workable licences, where they are not representative of certain types of content them and the educational establishment is legally protected because of the legal underpinning provided by the exception.